

IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS SPECTOR, ET AL., :

Petitioners :

V. : No. 03-1388

NORWEGIAN CRUISE LINE LTD. :

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Washington, D.C.

Monday, February 28, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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the Petitioners.

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DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 JUSTICE STEVENS: We'll now hear argument in
4 Spector against the Norwegian Cruise Line.

5 Mr. Goldstein.

6 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

7 ON BEHALF OF THE PETITIONERS

8 MR. GOLDSTEIN: Justice Stevens, and may it
9 please the Court:

10 The petitioners in this case are American
11 citizens who took cruises to and from this country on
12 tickets bought here that call for the application of U.S.
13 law. They were subject to discrimination by respondent, a
14 U.S.-based company on the land, in the ports, and in the
15 waters of the United States.

16 The question presented is whether the Americans
17 With Disabilities Act applies or instead whether
18 respondent's conduct is lawful because the case is
19 controlled by Bahamian law, which freely permits cruise
20 lines to discriminate against persons with disabilities.

21 JUSTICE O'CONNOR: Mr. Goldstein, may I inquire
22 of you whether other countries, for instance, in the EU
23 area, have applied their own disability laws to some of
24 the cruise ships that touch base in their courts?

25 MR. GOLDSTEIN: Justice O'Connor, our research

1 does not reveal that the question has arisen in the EU. I
2 can, however, provide you some information, and that is
3 that -- two points I think.

4 The first is they subscribe -- the members of
5 the EU subscribe to the same conventions and to UNCLOS
6 just the way we do, which gives the port state plenary
7 authority within its ports and internal waters. And I
8 have a couple of case citations for you on this issue. In
9 the ECJ, the Diva Navigation case, 1992, ECR I-6019, and
10 the Mateo Peralta case, 1994, ECR I-3453.

11 It has not arisen in the EU, but it has arisen
12 in Australia. Australia has a disability law. It applies
13 that law to cruise ships, and the rule in Australia is
14 that the port state law applies rather than the flag state
15 law. And the citation for that is the Union Shipping
16 case, 2002, NSWCA 124 CA 40379/01. I don't know what
17 those numbers mean.

18 JUSTICE O'CONNOR: Thank you.

19 And would you also address at some point how the
20 treaty on Safety of Life at Sea would affect the
21 resolution here? For example, it has, as I understand it,
22 requirements that there be watertight doors and those
23 doors have to be set above the level of the floor so you
24 couldn't roll a handicapped wheelchair or something over
25 it. Now, do you anticipate that there would have to be

1 structural changes if you were to prevail that would
2 conflict with the treaty on Safety of Life at Sea?

3 MR. GOLDSTEIN: No, and you have put your finger
4 on the point, and that is that there are no conflicts. We
5 know that for a couple of reasons.

6 The first is that there has been a detailed
7 rulemaking underway in which the regulatory authorities
8 charged by Congress with implementing the ADA have spent
9 quite some time. They have produced this single-spaced,
10 half-inch thick document that is dedicated to making --

11 JUSTICE O'CONNOR: Are they in effect yet?

12 MR. GOLDSTEIN: They are not, but in terms of
13 whether or not the statute, when it's applied, would
14 conflict, you would look to this document and they took as
15 their regulatory mission to make sure there were no such
16 conflicts. What they did -- let me take your example
17 specifically and then put -- place it within the statutory
18 framework.

19 Within the ADA and a question of the combings,
20 what they said is, that's right. In certain cases SOLAS
21 requires that the coamings be a certain height. If the
22 coamings are below the bulkhead level, where you would be
23 worried about water coming in below, that is not an
24 accessible route, and so you don't have to worry about it
25 at all. Above there, you ramp up to the coaming and ramp

1 down, unless that's structurally infeasible. So they --
2 what they did is they -- and this is the broader point.
3 they applied the rule of the ADA that a change to the
4 structure of the vessel only has to be implemented if it's
5 readily achievable. And what the regulatory authorities
6 determined is that if there is any conflict with SOLAS at
7 all, that change need not be made.

8 Now, you -- Justice O'Connor, you also focused
9 on the fact that there are some of our claims that
10 implicate the structure of the ship. They are, however, a
11 distinct minority, and we ought not lose sight of this
12 because I don't think the other side has any good argument
13 at all, under international law or anything else, that
14 would explain why they can charge a person with a
15 disability double.

16 JUSTICE KENNEDY: Can you tell me just a little
17 bit about that, how it works? Suppose that you prevail in
18 this case -- and it does seem to me that the -- the
19 charging the double doesn't involve modification of the
20 ship, obviously. How does it work if you have, oh, say,
21 an English passenger who buys an English ticket and is
22 charged double -- I don't know if that's the English law,
23 but let's assume -- then he comes on a cruise ship and he
24 goes to New York and Miami and -- and New Orleans? Can he
25 -- does he -- could he then sue, if -- if we rule for you

1 in this case?

2 MR. GOLDSTEIN: I would think on the question of
3 the charging double, the answer to that question would be
4 no because it would present a traditional, not unique to
5 the ADA, choice-of-law question, and that is, if you're in
6 England and you buy a ticket in England, your ticket is
7 going to be subject to English common -- in that case, the
8 English disability law. There is an English disability
9 law. It doesn't discuss cruise ships. It's -- but it's
10 broadly written.

11 But with respect to the structure of the ship, I
12 think that English passenger with a disability -- say that
13 you come across to the United States and you want to get
14 off in New York. I think that Congress clearly intended
15 that that person would be able to come off a -- off the
16 dock in a wheelchair, back onto the dock on the
17 wheelchair; while you were in U.S. ports and you're
18 staying in your cabin, that you would be able to, in your
19 accessible -- your accessible rest room, have grab bars.

20 We are -- and -- and let me not pass too quickly
21 by the fact that even when we talk about some structural
22 changes in the ship, by and large we're talking about
23 things that have nothing to do with -- Justice O'Connor,
24 you focused the name of the treaty is the Safety of Life
25 at Sea. Whether the bathroom doors swing in and out has

1 nothing to do with that. Whether there is --

2 JUSTICE GINSBURG: Mr. Goldstein, may -- may I
3 take it from your answer that it doesn't make any
4 difference in your view, your answer to the question about
5 the -- the ship leaving from a port in England and going
6 many places and touching base in New York, that kind of a
7 voyage, or what this case seems to be where the vast
8 majority of the passengers are from the United States, the
9 port of departure is in the United States, the port of
10 return is in the United States. You don't seem to
11 distinguish those cases because you say in the New York
12 port, it doesn't matter if it's really a U.S.-centered
13 cruise or a cruise centered in Italy or any place else.
14 Is that correct?

15 MR. GOLDSTEIN: I think your formulation is
16 exactly right, Justice Ginsburg. It doesn't matter to us
17 where the cruise is centered.

18 We do, however, and this Court's precedents do,
19 however, leave room for a highly unusual cruise that I'm
20 not aware exists. Take, for example, a situation in which
21 a cruise comes from England to the United States. It
22 doesn't pick up any passengers here. They just visit.
23 They stop in 15 other countries. They stop here. The
24 same passengers get up on the ship and leave. This
25 Court's precedents involving maritime choice of law leave

1 room for the conclusion that says, look, we just don't
2 think --

3 JUSTICE GINSBURG: But if we go back to what is
4 the more usual situation --

5 MR. GOLDSTEIN: Yes.

6 JUSTICE GINSBURG: Then you are, in effect,
7 saying that the U.S. rules the world. Even if the home
8 port, the place where this vessel is usually berthed, says
9 we -- we don't require our ships to take care of the
10 handicapped, you are, in effect, saying no matter what the
11 other ports say, what the U.S. law is is going to govern
12 because practically if you're going to design the ship to
13 meet the U.S. requirements, you're not going to rip those
14 out when the ship goes elsewhere.

15 MR. GOLDSTEIN: Justice Ginsburg, we disagree
16 with the characterization that the U.S. rules the world,
17 of course. We're talking about the fact Congress
18 exercised its sovereign authority to control vessels in
19 its ports and internal waters, just as in -- take the
20 Cunard example. In the Cunard case, there were countries
21 -- and I understand it didn't involve the structure of the
22 ship, but the principle is the same. There were countries
23 that required alcoholic beverages to be on those vessels,
24 and --

25 JUSTICE SCALIA: We -- we could -- we could

1 require ships that are docked in the United States to pay
2 their crews according to United States Jones Act
3 requirements or United States minimum wage laws and so
4 forth. We don't do that. We could do it, but we don't
5 because it conflicts with -- with the law of the flag and
6 -- and that's the usual -- it's not a matter of our power
7 to do it. We could do it, of course, but it's just not
8 something we ordinarily do.

9 MR. GOLDSTEIN: Well, Justice Scalia, I actually
10 disagree with your characterization and would like to
11 point you to a couple of precedents. The Benz and
12 McCulloch cases, which are very important to the
13 respondents, were very important to the Fifth Circuit,
14 embody the principle that you just described, to some
15 extent, and that is that when you have a foreign ship in
16 our waters, we will not apply the NLRA to the labor
17 contract between the foreign crew and the foreign vessel.
18 But when Americans are involved, we do apply the NLRA, and
19 that's the Ariadne precedent that the -- and -- and in
20 fact, Ariadne is the most on-point case because it --

21 JUSTICE SCALIA: Was -- was that the ship or was
22 it longshoremen?

23 MR. GOLDSTEIN: It was longshoremen working on
24 the ship complaining about safety conditions on the ship.

25 JUSTICE SCALIA: Longshoremen. Longshoremen

1 based -- based on shore. Right?

2 MR. GOLDSTEIN: Based on shore, but so are the
3 passengers.

4 JUSTICE SCALIA: That's a different --

5 MR. GOLDSTEIN: But it is a different situation,
6 but I think it's more analogous. Not only were the -- the
7 protests in Ariadne directed at the safety conditions on
8 the foreign-flagged vessel, but they were directed at the
9 passengers. If I could --

10 JUSTICE BREYER: What's -- what's the scope of
11 what you're talking about here? I mean, are -- it says
12 cruise ships. So I had assumed those are those big ships
13 that carry people mostly around the Mediterranean from
14 Florida. But based on what you're saying, now I think
15 you're talking about something more. Are you talking, for
16 example, about a merchant vessel that comes from, say,
17 Saudi Arabia and has a few passengers? What's the --
18 what's the scope of the definition?

19 MR. GOLDSTEIN: The -- well, that -- the
20 definition -- we would have to return to the ADA. If a
21 merchant ship has a few passengers, it would not be a
22 specified form of public transportation or a public
23 accommodation.

24 JUSTICE BREYER: Because? It -- what it does is
25 it carries oil, but a certain number of people like to be

1 on a ship with oil, I guess. And so every -- every month
2 they take 12 people and they put them in a cabin somewhere
3 and they love it.

4 JUSTICE SCALIA: It's cheaper. It's cheaper
5 too.

6 (Laughter.)

7 MR. GOLDSTEIN: I'm not aware of -- of --

8 JUSTICE BREYER: No, no. I -- but all right.
9 Now, I'm -- I'm being facetious.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE BREYER: But I am aware of -- of people
12 who have certainly gone on cruises on what is a primarily
13 merchant ship. Now that -- that I think is a common
14 thing.

15 MR. GOLDSTEIN: If -- let me --

16 JUSTICE BREYER: Are you talking -- because I
17 think that makes a difference for the reason that once you
18 talk about those, you're talking about primarily foreign-
19 flagged vessels that are rarely but sometimes in the
20 United States where the costs would be very high probably
21 to change the ship and the benefit to Americans would be
22 tiny. All right. So I -- I want to know what you're
23 talking about.

24 MR. GOLDSTEIN: Okay. Let me first say -- and
25 just to -- to lock the point down in that cost is

1 accounted for in the definition of what is readily
2 achievable.

3 But let's go to the definition of specified public
4 transportation because this will tell us what's going to
5 be covered by the ADA. And just for the transcript, the
6 citation is -- this is section 12181(110). It's -- it's
7 very short, but it's at the middle of page 12 of the blue
8 brief. Specified public transportation means
9 transportation by bus, rail, or any other conveyance other
10 than by aircraft, which has its own statute, that provides
11 the general public with general or special service on a
12 regular and continuing basis. That too would be covered.
13 And only the public places on the ship would be covered by
14 it.

15 Can I just return briefly to my `Ariadne point?
16 Because I just wanted -- that's a case where the -- the
17 NLRA was applied. And let me just read to you what the
18 protest was that the NLRA was applied to because it fits
19 perfectly with this case. And again, for the transcript,
20 this is in the lower court opinion at 215 So.2d 53. This
21 was the handbill. Warning. Is your cruise ship a
22 floating death trap? Can a substandard foreign-flagged
23 cruise ship turn your holiday into a Holocaust? They were
24 very illiterate. If thousands of unsuspecting Americans
25 continue to place their lives in jeopardy every day on

1 cruises aboard foreign-flagged floating fire traps. And
2 that -- that was a foreign-flagged ship. They we're
3 concerned about the passengers.

4 Justice Scalia, you also gave the example of the
5 Jones Act, but remember that the Rhoditis case and the
6 Uravic case, which involved injuries in the United States,
7 then the Jones Act did apply. And that was -- and
8 Rhoditis was a case in which someone was on the ship and a
9 chain broke and they were injured as a result of it, and
10 U.S. law applied.

11 This is a situation in which millions of people
12 in the United States are spending billions of dollars on
13 cruises, and it seems --

14 JUSTICE STEVENS: Yes, but I -- if I understand
15 you correctly, your case really isn't limited to cruise
16 ships. It's limited to ships that come into -- passenger
17 ships, which would include the Queen Mary and Queen
18 Elizabeth, all the rest of them. Wouldn't it?

19 MR. GOLDSTEIN: Yes, but I -- I take it that the
20 -- you know --

21 JUSTICE STEVENS: And the fact that it's based
22 in Miami or it had mostly American customers really is not
23 relevant to the legal issue. Is it?

24 MR. GOLDSTEIN: It -- it is in the sense that it
25 makes this the recurring scenario that Congress would have

1 been aware of when it enacted the ADA in --

2 JUSTICE STEVENS: But, of course, they would
3 have been aware of those that are also less American in
4 their patronage and so forth.

5 MR. GOLDSTEIN: That's true. In the very rare
6 case, which I am not aware of, in which a cruise ship
7 comes to the United States, doesn't pick up passengers,
8 then it's possible that the -- that the ADA would not
9 apply.

10 JUSTICE STEVENS: No, but we're not necessarily
11 thinking of a cruise ship, just the transatlantic liner
12 that goes from Liverpool to Miami or something. That
13 would be covered.

14 MR. GOLDSTEIN: It would in -- in U.S.
15 territory. That's right.

16 JUSTICE BREYER: But there's no way they can
17 change the ship structurally when it's in New York and not
18 have it changed structurally when it's in Europe. So the
19 mystery to me at this moment is what is the universe of
20 ships that I would not say fit the ordinary word cruise.
21 What they are are ships that go between Asia and San
22 Francisco, Los Angeles, or New York and Europe, or maybe
23 through the Suez Canal. They're only here a little bit of
24 the time. Their passengers are mostly not American.

25 Now, is that something I should worry about? If

1 that were your case, I would be very worried. If that's
2 just a little bit of -- of added significance, then I want
3 to know what to do about it.

4 MR. GOLDSTEIN: Let me tell you what I know, and
5 that is that the other side has not identified any
6 problems of this -- this type. My research has not
7 revealed some situation where we have a lot of these
8 ships. I did carefully study the -- the itineraries of
9 the major cruise lines, and 95 percent-plus of all of
10 their trips go out from the United States and come back to
11 the United States.

12 JUSTICE GINSBURG: But you told me -- and I want
13 to make sure this is your answer -- that it doesn't
14 matter, that as long as the ship comes to a U.S. port as
15 part of this overall journey, you -- you answered that
16 question and I thought that was your candid answer, that
17 it doesn't matter that these -- these particular cruise
18 ships ply mostly U.S. waters and U.S. trade and are
19 centered, even have their principal place of business in
20 the United States. You're not concentrating on that
21 category. You are saying that the ADA applies so long as
22 the ship puts in at -- at a U.S. port, picks up
23 passengers. It applies not only while it's in the port,
24 but practically for every other place the ship goes.
25 That's why I asked isn't this the United States rules the

1 world on what -- your argument you made.

2 MR. GOLDSTEIN: Justice Ginsburg, here I think
3 is the difference, and that is, that while U.S. law may
4 have an extraterritorial consequence, just like our
5 maritime tort law and the like, you cannot in Europe
6 enforce the ADA. The fact that the structural changes --

7 JUSTICE SOUTER: Well, you can enforce the --
8 the discrimination provisions, but the structural
9 provisions don't have to be enforced. Once the step is
10 changed, they're not going to change it when they get 3
11 miles out.

12 MR. GOLDSTEIN: That's right. But Justice --
13 Justice Ginsburg's point -- I take it to be a more
14 particular one. It's true that our law will have
15 consequences abroad, but it is not the case that the U.S.
16 rules the world.

17 JUSTICE SOUTER: Well, it rules the world unless
18 the world does not want to use the United States ports as
19 ports of call.

20 MR. GOLDSTEIN: Justice -- Justice Souter, I --
21 I simply disagree, and that is, when you talk about the
22 U.S. ruling the world, in a -- in the context, say, of
23 ARAMCO, we talked about the enforceability of U.S. law
24 abroad. When the United States has tort standards or
25 vehicle manufacturing standards and the like, all of those

1 have consequences abroad for how devices are made and
2 brought into the country. But that doesn't mean that --
3 what's going on is the plenary authority of the United
4 States to enforce its laws in its ports and in its
5 internal waters. That very rule always will have
6 extraterritorial consequences.

7 JUSTICE SCALIA: We're not questioning the
8 authority. We're questioning whether Congress intended
9 that to be the case. We have a rule that -- that requires
10 a clear statement when it has effects of this sort.

11 MR. GOLDSTEIN: Justice Scalia, we disagree, and
12 let me just take you to your cases. I did that, I think,
13 in the Jones Act and the NLRA context. But let's just
14 state the rule, and that is, from the Wildenhus's Case and
15 that's at page 12. Foreign law governs matters of
16 discipline and all things done on board which affected
17 only the vessel and those belonging to her and did not
18 involve the peace or dignity of the country or the
19 tranquility of the port. And what we're talking --

20 JUSTICE STEVENS: But, Mr. Goldstein, there's
21 another aspect that troubles me. Your view, as I
22 understand, only applies while the ship is in American
23 waters so that if, for example, you complain about the
24 training for a safety drill, if they conducted those after
25 they'd gone out 20 miles to sea, there would be -- there

1 would be no violation of the -- the statute. Would there?

2 MR. GOLDSTEIN: That is -- that is a difficult
3 question. We have not -- we have not pleaded such a
4 claim.

5 JUSTICE STEVENS: In other words, I'm trying to
6 understand. You don't know what your position is --

7 MR. GOLDSTEIN: No.

8 JUSTICE STEVENS: -- with respect to what would
9 otherwise be violations of the statute that occur on the
10 high seas.

11 MR. GOLDSTEIN: We do believe it would be
12 covered because the accommodation was purchased here,
13 although we haven't raised the claim in this Court.

14 If I could reserve the remainder --

15 JUSTICE STEVENS: Yes, but I think we should --
16 the cruise ships are entitled to know whether they may
17 freely discriminate against people in the casinos and so
18 forth when they're on the high seas.

19 MR. GOLDSTEIN: We --

20 JUSTICE STEVENS: You don't know the answer to
21 that.

22 MR. GOLDSTEIN: Justice Stevens, our position is
23 that because of the definition of commerce in the ADA,
24 when you purchase a public accommodation in the United
25 States, that is an agreement to provide a public

1 accommodation and it doesn't --

2 JUSTICE STEVENS: So your view is not limited to
3 what happens in the territorial waters.

4 MR. GOLDSTEIN: That is right, although we have
5 -- we would win the case on the internal waters and the
6 territorial waters, and we haven't asserted in this Court
7 a claim relating to the high seas.

8 If I could reserve the remainder of my time.

9 JUSTICE STEVENS: Mr. Salmons, may I ask before
10 you begin whether the United States agrees that the
11 statute would apply to the activities of these ships when
12 they're on the high seas?

13 ORAL ARGUMENT OF DAVID B. SALMONS

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

16 MR. SALMONS: Justice Stevens, and may it please
17 the Court:

18 We do not think that title III of the ADA was
19 intended to apply extraterritorially. That said, we think
20 there is a question that would need to be resolved as to
21 whether applying the ADA to a public accommodation that
22 was entered into in the United States, that began in the
23 United States, a necessary term of which we believe would
24 be nondiscrimination, would in fact be an extraterritorial
25 application of U.S. law.

1 JUSTICE SCALIA: When -- when the ship is out on
2 the high seas?

3 MR. SALMONS: That's correct, Justice Scalia.

4 JUSTICE SCALIA: You think that's a hard
5 question --

6 MR. SALMONS: No. We think the better view --

7 JUSTICE SCALIA: -- whether that's an
8 extraterritorial application of U.S. law?

9 MR. SALMONS: No. We think the better view, in
10 fact, Justice Scalia, is that that would not be an
11 extraterritorial application of U.S. law. But if the
12 Court were to disagree, then we would say title III does
13 not apply at that time.

14 JUSTICE GINSBURG: Do you --

15 JUSTICE SCALIA: I don't know what
16 extraterritorial application means if it doesn't mean
17 that, that a ship that is not in the United States is
18 bound by United States law. What -- why isn't that
19 extraterritorial application?

20 MR. SALMONS: The reason, Justice Scalia, would
21 be because the accommodation that was offered, that was
22 entered into, and that began in the United States -- and
23 -- and I would point out -- I think this is important to
24 keep in mind --

25 JUSTICE SOUTER: What you're saying is it would

1 -- I thought you were saying that it would be the
2 enforcement of the domestic contract of which the -- the
3 statutory provisions would be an implied term. Isn't that
4 it?

5 MR. SALMONS: Yes. Yes, that's correct.

6 JUSTICE SOUTER: It does not apply of its own
7 force. It applies because two parties in the United
8 States contracted that it would apply. Is that it?

9 MR. SALMONS: That's correct. Now -- now, I --
10 I would just add that I think it -- you could characterize
11 a public accommodation, you know, five nights lodging, for
12 example. If that's entered into in the United States and
13 -- and that begins in the United States, that a necessary
14 term of that is nondiscrimination, and --

15 JUSTICE STEVENS: Well, then if you --

16 MR. SALMONS: -- if you have an ADA claim that
17 governs that even if the discrimination occurred abroad,
18 that would only relate to those things tied into the
19 accommodation.

20 JUSTICE STEVENS: But if you're on a round trip
21 ticket from Liverpool to Miami and back, it would depend
22 on where you bought the ticket.

23 MR. SALMONS: Well, again, we -- we think that
24 if accommodation begins here in the United States, that --
25 that a necessary term of that is nondiscrimination. Now,

1 whether you characterize that as a contract claim or as a
2 substantive application of the ADA, I'm not sure there's
3 much of a difference.

4 JUSTICE SOUTER: Yes, but Justice Stevens'
5 question is you buy the ticket in Liverpool. Is the ADA
6 -- an -- an American buys the ticket in Liverpool to come
7 to the United States.

8 MR. SALMONS: To come to the United States.

9 JUSTICE SOUTER: Is the ADA an applied term of
10 that contract?

11 MR. SALMONS: I would -- I would assume not,
12 although the question then would be whether or not it's a
13 public accommodation that's been offered in the United
14 States.

15 JUSTICE SCALIA: Don't -- don't `all --

16 JUSTICE KENNEDY: Even in U.S. waters? That
17 wouldn't make sense. An American buys a ticket in -- in
18 Liverpool. He's disabled. He goes to New York, Miami,
19 New Orleans, and he's discriminated at -- at each step.
20 No -- no coverage just because of where he bought the
21 ticket?

22 MR. SALMONS: No, no, Justice Kennedy, that's
23 not our position. Let me -- let me try and be clear. We
24 think that any vessel that comes into the internal waters
25 and ports of the United States and offers a public

1 accommodation or a specified public transportation service
2 to our residents is subject to the ADA.

3 JUSTICE GINSBURG: Do you --

4 JUSTICE BREYER: Well, that means --

5 MR. SALMONS: If -- if you had a situation --
6 I'm sorry.

7 JUSTICE BREYER: No, go ahead.

8 MR. SALMONS: If you had a situation where you
9 had a ship that -- let's say, that began in -- in Great
10 Britain and came here, it didn't pick up passengers here
11 in the United States, I think that the better view would
12 be, sure, United States law could apply to it because it's
13 in our internal waters, but that as a substantive matter,
14 with regard to the ADA, I don't know why that would be a
15 public accommodation within the meaning of the ADA because
16 it's not an accommodation that's offered --

17 JUSTICE GINSBURG: But do you --

18 MR. SALMONS: -- or available to United States
19 residents.

20 JUSTICE GINSBURG: Do you agree with Mr.
21 Goldstein that nothing turns on -- one might characterize
22 this kind of cruise as U.S.-centered, but his answer was
23 as long as they put in, a regular cruise stop, they pick
24 up, unload passengers, they take them back again on the
25 ship, so long as they touch base at a U.S. port, letting

1 off and picking up passengers, the ADA applies? Do you
2 agree with that interpretation?

3 MR. SALMONS: As I understand what Your Honor
4 just said, I think that I would. Let me just clarify,
5 though. We think the relevant question is whether that
6 ship would -- has offered a public accommodation or a
7 specified public transportation service --

8 JUSTICE GINSBURG: This is my --

9 MR. SALMONS: -- in the United States, and if
10 the answer is yes --

11 JUSTICE GINSBURG: Let -- let me ask you the
12 same question that I asked Mr. Goldstein. Even in the
13 Cunard case, the prohibition case, they couldn't have
14 liquor in the U.S. port, but when they leave and they go
15 to Jamaica, they could pick up rum there. They could have
16 liquor all the rest of the time so long as, when they
17 enter and leave the U.S. port, they didn't have the liquor
18 aboard.

19 Here what you're saying is what goes in the --
20 for the New York port goes for every other place where
21 this ship puts in.

22 MR. SALMONS: Well, again, I -- not as a matter
23 of -- not as a matter of extraterritorial application of
24 U.S. law, but that is our position with regard to a public
25 accommodation that begins in the United States. I -- I

1 think the -- the important --

2 JUSTICE GINSBURG: Suppose it doesn't begin in
3 the United States in that it -- it starts in, say, The
4 Bahamas, and stops at --

5 MR. SALMONS: I should probably should not have
6 said begin, Your Honor. What I mean is if it -- if the
7 public accommodation is provided for in the United States,
8 that would be covered by the terms of the ADA, we think
9 the ADA applies.

10 JUSTICE BREYER: Then you're saying exactly what
11 everybody is worried about. I take it there is no way
12 really for a ship to -- they either have the right door or
13 they don't have the right door. And we're interested in
14 the set of cases in which they're going to have to change
15 their doors. And what I came in here thinking was we're
16 talking about ships that pick up people and sail in
17 Florida and sail around the Caribbean. That's the -- now,
18 I've heard nothing but we're not talking just about those.
19 We are talking about ships like I'm the last human being
20 alive that went on a Swiss ship to Europe. Okay?

21 (Laughter.)

22 JUSTICE BREYER: 50 years ago. And -- and we're
23 talking about those ships, or we're talking about merchant
24 ships that also say to the public, come as a passenger.

25 Now, I would like to -- not what you're arguing.

1 You're going to say, yes, we are arguing it. I want to
2 know -- say something to relieve my concern about that
3 set, which was Justice Ginsburg's concern. We are trying
4 to rule the world in respect to those ships that only come
5 here occasionally or it isn't a big part of their
6 business, but they want to come to pick up American
7 passengers.

8 MR. SALMONS: Sure. Sure. And what I would say
9 with regard to that is that you're right that our broad
10 view is that the ADA applies if that -- if they're
11 offering public accommodation here in the United States.

12 But if you reject that, I think there are
13 several ways you could approach that. One would be to
14 apply traditional choice-of-law factors that are -- that
15 are applicable in maritime, and you could conclude, you
16 know, based on sort of whether or not there are sufficient
17 contacts here and whether or not --

18 JUSTICE KENNEDY: Well, you're saying that this
19 is your position, but don't worry about it because we'll
20 reject your position?

21 MR. SALMONS: No, no. He asked me to say
22 something that -- that would -- would help his concerns.
23 What I'm trying to say --

24 JUSTICE BREYER: One thing might be true, what
25 you're not saying, is there really aren't very many of

1 those ships, or another thing you might say, which you're
2 not saying because maybe isn't true, is almost all of
3 those ships that there are already subject to tougher
4 -- tougher rules, say, in Europe. But you don't say
5 either of those.

6 MR. SALMONS: No. No --

7 JUSTICE BREYER: Since you don't you say either
8 of those, I think neither may be true.

9 MR. SALMONS: Well, I don't know the specific
10 number. I would think that there are not many that the --
11 that this -- what you're concerned with primarily here are
12 cruise ships that are in the business of providing public
13 accommodations.

14 But I would add as well -- and I think this is
15 very important that the Court keep in mind -- that the
16 clear statement rule, as it's -- as it's posited by
17 respondent here, would not just apply to the ADA. It
18 would apply to all U.S. laws, and that would include title
19 II of the Civil Rights Act of 1964 in its prohibition of
20 racial discrimination, and I would find that that would be
21 a remarkable construction.

22 JUSTICE SCALIA: It depends on what -- what kind
23 of laws you're talking about. Laws that require the crew
24 to be treated differently are -- are quite different from
25 law -- laws that -- that require a passenger to be treated

1 a certain way in the United States.

2 MR. SALMONS: Justice Scalia, you're correct,
3 and that's precisely why they have --

4 JUSTICE SCALIA: And laws -- laws that require
5 structural alteration of a ship are quite different from
6 laws that say while you're in United States waters, you
7 won't discriminate on the basis of race.

8 MR. SALMONS: If -- two -- two responses, if I
9 may, Your Honor. And that is, if you -- if that is the
10 conclusion you reach, then you still need to remand this
11 case because there are an awful number of claims that are
12 precisely those kinds of claims that the Fifth Circuit
13 would not allow.

14 Secondly, I think you're wrong with regard to
15 the scope of the clear statement requirement. There is no
16 requirement that you have to have a clear statement to
17 apply a U.S. law to a foreign vessel. There is only a
18 requirement that you need a clear statement if the conduct
19 at issue would relate only to the internal matters of that
20 vessel. And here you're dealing with public
21 accommodation --

22 JUSTICE SCALIA: If we haven't expressed it yet,
23 we ought to express it then.

24 MR. SALMONS: Well, I disagree, Your Honor. And
25 what I would point you to is -- is that the long -- every

1 time this Court has spoken with regard to the clear
2 statement requirement relating to foreign-flagged ships,
3 it has referred to the internal order doctrine. And that
4 is embodied in a number of bilateral agreements that go
5 back for centuries. The -- the treaty that was at issue
6 in the Wildenhus's Case expressly said that if the -- if
7 the conduct did not relate to members of the crew but to
8 passengers or other members of the port state or otherwise
9 affected the interests of the port state, that the port
10 state law would apply. And that is the general rule.

11 The international regime that governs this area
12 by its terms provide minimum standards and leaves it
13 available to port states and to flag states to add
14 additional requirements. That would mean --

15 JUSTICE SOUTER: Mr. Salmons, one of the
16 alternatives you threw out, not as a response to clear
17 statement, but as a -- a response to the issue that was
18 being raised by it, was the provision of the statute that
19 it was intended to exercise the -- the fullest extent of
20 the -- of the commerce power. And The -- The Bahamas
21 respond to that by saying you could have said exactly --
22 or argued exactly the same thing in McCulloch. What is
23 your response to that?

24 MR. SALMONS: Well, I -- I would disagree with
25 that on -- on a couple of respects. The first is that the

1 definition of commerce here is broader than it was and
2 specifically refers to travel between the United States
3 and foreign countries. The only other statute we're aware
4 of that says that is title II of the Civil Rights Act of
5 1964.

6 In addition --

7 JUSTICE SOUTER: Well, may I just ask you a -- a
8 factual question? I didn't go back to the text to check
9 this. Does the text of this statute say in these words
10 basically we are exercising the fullest possible extent of
11 the commerce power?

12 MR. SALMONS: Absolutely, Justice Souter. What
13 -- what the text of the statute says --

14 JUSTICE SOUTER: And it's not in McCulloch.

15 MR. SALMONS: That's correct. What the text of
16 this statute says is that -- in fact, this is the
17 definition of commerce that relates only to title III of
18 ADA. And it says precisely that it includes travel
19 between foreign countries and the United States and that
20 Congress was intending to -- to reach the full sweep of
21 its -- its constitutional authority.

22 JUSTICE STEVENS: Thank you, Mr. Salmons.

23 Mr. Frederick.

24 ORAL ARGUMENT OF DAVID C. FREDERICK

25 ON BEHALF OF THE RESPONDENT

1 MR. FREDERICK: Thank you, Justice Stevens, and
2 may it please the Court:

3 This case is about congressional intent not
4 congressional power. Congress undoubtedly has the
5 power --

6 JUSTICE O'CONNOR: Could you address the last
7 point?

8 MR. FREDERICK: Yes. It was not the fullest
9 extent of the commerce power. That statute was at issue
10 in this Court's case concerning the Lanham Act where the
11 Court said that a violation of the Lanham Act that
12 occurred in Mexico but had an effect in the United States
13 was intended to be covered by Congress because that
14 commerce clause, Justice Souter, did state to the fullest
15 extent of Congress' power under the Commerce Clause of the
16 Constitution.

17 This statute does not say that. This statute
18 talks about commerce in and between States and
19 territories, and it is much closer to the statute language
20 that this Court addressed in the ARAMCO case where --

21 JUSTICE SOUTER: So it -- it doesn't have the
22 fullest extent language then.

23 MR. FREDERICK: That's correct. That's correct.

24 JUSTICE GINSBURG: How does it compare to title
25 II of the Civil Rights Act of 1964?

1 MR. FREDERICK: Well, there are slight
2 differences in the language, but I don't think that's
3 dispositive because title VII of the Civil Rights Act,
4 which this Court addressed in the ARAMCO case, the Court
5 -- the Chief Justice's opinion there said that that
6 language was not enough to express the intent.

7 JUSTICE GINSBURG: So that would be the same for
8 title II, which is the public accommodations part of the
9 Civil Rights Act of 1964. So I take it that you are
10 saying that on these foreign-flagged vessels, just as the
11 ADA would be inapplicable, so title II, the public
12 accommodations part of the Civil Rights Act of 1964, would
13 be inapplicable.

14 MR. FREDERICK: It's all a question of
15 congressional intent, Justice Ginsburg, and there's no
16 indication of an intent that Congress needed to address
17 any problem that arose with respect to that form of
18 discrimination.

19 JUSTICE GINSBURG: So your -- but your answer
20 is, there being no such indication, that a ship putting in
21 at a U.S. port was free to discriminate among its
22 passengers on the basis of race.

23 MR. FREDERICK: Well, there would be no U.S.
24 congressional statute that would address that, Justice
25 Ginsburg. There would be a violation of the Bahamian

1 constitution which prohibits --

2 JUSTICE GINSBURG: I'm asking about the U.S. law
3 and policy which says no segregation, no discrimination in
4 places of public accommodation.

5 MR. FREDERICK: As I said, I'm not aware that
6 there has ever been an instance of that in the cruise
7 industry. Congress has not addressed that. We're talking
8 about foreign ships here.

9 And I want to get back to the structural
10 features of the ship because the ADA fundamentally --

11 JUSTICE O'CONNOR: Well, but this is a good
12 question, and what is your position? That the ship could
13 engage in racial discrimination while in U.S. ports on the
14 selling of tickets and the provision of accommodations
15 while in U.S. ports and within the 3 --

16 MR. FREDERICK: Justice O'Connor, our position
17 is that Congress has not spoken to the question, and so
18 there is no congressional statute that is on point.

19 JUSTICE SOUTER: Then your answer, I take it, is
20 yes, it can discriminate and it can discriminate because
21 Congress has not told it not to. Is that it?

22 MR. FREDERICK: No. No. Our position is that
23 it can't discriminate because a different law proscribes
24 that --

25 JUSTICE SOUTER: So far as United States law is

1 concerned, it could.

2 MR. FREDERICK: Yes.

3 JUSTICE GINSBURG: And the same answer for 1981?

4 MR. FREDERICK: Justice Ginsburg, as I said,
5 Congress has not extended its laws to the full reach of
6 U.S. territorial power, and this Court has maintained that
7 position ever since the Charming Betsy case 200 years ago,
8 The Schooner Exchange case, and Brown v. Duchesne.

9 JUSTICE KENNEDY: Well, let's put it this way.
10 So my understanding of your answer is that we could write
11 an opinion ruling for you but leaving these other
12 questions open? I don't see how we can do that.

13 MR. FREDERICK: What you say, Justice Kennedy,
14 is that the clear statement canon requires Congress to say
15 when it intends to apply a law to a foreign vessel.
16 Congress didn't do that.

17 JUSTICE KENNEDY: But if I'm writing the opinion
18 and I put that down and rule for you, it seems to me that
19 I then answered necessarily Justice Ginsburg's question in
20 the negative.

21 MR. FREDERICK: You do, Justice Kennedy. And
22 just as this Court in the ARAMCO case said that title VII
23 doesn't apply to the foreign -- work in a foreign land by
24 an American company of an American --

25 JUSTICE KENNEDY: But these --

1 MR. FREDERICK: Justice Kennedy, Congress hasn't
2 extended criminal laws of the United States to the full
3 reach of U.S. power. It is only proscribed 15 offenses
4 that will apply in the special maritime jurisdiction.

5 JUSTICE GINSBURG: Mr. Frederick, this is --
6 this is what concerns me about your answer. I know that
7 Mr. Goldstein took the position that it doesn't matter
8 what kind of operation this is, but the operation that
9 we're dealing with, it sells tickets mainly to -- what
10 percentage of its passengers are from the USA?

11 MR. FREDERICK: Approximately two-thirds to
12 three-quarters in any given year.

13 JUSTICE GINSBURG: And does it normally start
14 the voyage and end it in U.S. ports?

15 MR. FREDERICK: The majority of them do.

16 JUSTICE GINSBURG: And how much of its
17 advertising budget is pitched at U.S. customers?

18 MR. FREDERICK: Justice Ginsburg, there -- all
19 of those questions are going to be answered as a
20 predominant marketing effort, et cetera is directed to the
21 U.S. market.

22 JUSTICE GINSBURG: Well, this is the anomaly.
23 You're asking us to buy an interpretation. An enterprise
24 is U.S.-centered in terms of where it gets its business
25 and that enterprise, nonetheless, is not bound by what is

1 our bedrock anti-discrimination law both with regard to
2 customers, passengers, and employment.

3 MR. FREDERICK: And the reason, Justice
4 Ginsburg, is that that law imposes structural changes on
5 vessels that go to other ports.

6 JUSTICE SCALIA: Why don't you -- why don't you
7 try to draw that line? Why don't you say that just as the
8 applicability or not may depend upon whether you're
9 dealing with a crew of a foreign ship or whether you're
10 dealing with an American who happens to be injured on
11 board that ship, so also it may depend upon whether the
12 anti-discrimination law in question is one that at least
13 in some of its applications requires structural changes or
14 not? That would enable you to say the ADA doesn't apply,
15 but would not compel you to say that title II doesn't
16 apply.

17 MR. FREDERICK: We are talking --

18 JUSTICE SCALIA: You're not willing to take such
19 a limited position.

20 MR. FREDERICK: Well, Justice Scalia, I think
21 the Court could certainly carve out in its clear --
22 articulation of the clear statement principle some of
23 these lines. It becomes very --

24 JUSTICE O'CONNOR: Well, the ADA itself makes an
25 exception for things that aren't readily achievable. I

1 mean, you could certainly lean on that because a
2 structural change probably isn't readily achievable.

3 MR. FREDERICK: Justice O'Connor, Congress, when
4 it talked about readily achievable, did so in terms of
5 cost. It didn't do so in terms of conflict with the laws
6 of other nations or --

7 JUSTICE BREYER: Well, is there -- is there -- I
8 mean, you're giving me the answer I thought the other side
9 would give me. All right? And I appreciate it actually.

10 (Laughter.)

11 JUSTICE BREYER: You say that two-thirds of
12 these people, the customers, are American. So we're
13 dealing with a business that is primarily American, not a
14 business like the Swiss ship except in exceptional cases.
15 Then you say, all right, still it's a problem because of
16 structural changes we'll have to make. What changes?
17 That is to say, I would have thought I could have read,
18 but I haven't, that other countries like Europe also have
19 discrimination laws against disabled people, and
20 therefore, given that fact and given the document that Mr.
21 Goldstein produced, it is highly unlikely that your
22 clients will have to make any significant structural
23 change that they wouldn't have had to make anyway.

24 MR. FREDERICK: That's --

25 JUSTICE BREYER: Now, what's the response to

1 that?

2 MR. FREDERICK: Well, that's completely false.

3 In -- in the year 2000, the United States Government
4 issued a report that contained an extensive appendix,
5 which we've cited in our brief, that details in laborious
6 detail the conflicts between land-based ADA standards and
7 SOLAS.

8 Now, I can give you some specifics, if you would
9 -- that are fairly practical, such as the ADA requires
10 under the interpretation advanced by the petitioners that
11 there be a disabled access cabin on every level of the
12 ship, but SOLAS requires that passengers with disabilities
13 be placed near evacuation points.

14 JUSTICE KENNEDY: Why -- why can't you just
15 fight that battle by battle on what's reasonably
16 achievable? Because in order to avoid that problem, what
17 you're telling us is that a cruise line can charge a -- a
18 disabled person double the price --

19 MR. FREDERICK: As a matter of fact --

20 JUSTICE KENNEDY: -- because they're a nuisance.
21 And that's your position.

22 MR. FREDERICK: Justice Kennedy, as a matter of
23 fact, we categorically deny the claims of discrimination
24 here. We're having to fight this on the basis of assuming
25 the -- the allegations are true, but they are

1 categorically false. And --

2 JUSTICE GINSBURG: But it doesn't matter what
3 you want to do as a matter of good will. The question is
4 what the law requires you to do, and you're saying it's up
5 to us, we govern. You're not governed by U.S. anti-
6 discrimination law.

7 MR. FREDERICK: Justice Ginsburg, what the other
8 side wants is a case-by-case method of decision-making in
9 which a district judge becomes the special master of the
10 cruise industry so that each claim of discrimination that
11 would require some modification to the ship --

12 JUSTICE KENNEDY: That happens to every employer
13 under -- in the United States under the reasonably
14 achievable standard.

15 MR. FREDERICK: And that's why, Justice Kennedy,
16 it's a question of congressional intent. The very same
17 Congress debated extensively about whether to impose
18 design requirements on foreign ships in the Oil Pollution
19 Act of 1990, and it decided to buck the international
20 system knowingly by imposing a design requirement that
21 double hulls be imposed on oil tankers, foreign oil
22 tankers.

23 JUSTICE STEVENS: Mr. Frederick, that brings up
24 a question I've been meaning to ask you. To what extent
25 was this whole problem of the application of this statute

1 to the foreign vessels discussed in the legislative
2 history of these statutes?

3 MR. FREDERICK: Zero. There is not one word
4 about vessel --

5 JUSTICE BREYER: All right. If -- if that's so
6 and if you look at the earlier cases -- but all I could
7 get out it is that those earlier cases -- the Court tries
8 to do what it really would have thought Congress would
9 have intended in the circumstances. And if that's so, why
10 wouldn't Congress really have intended that a business
11 that's two-thirds American has to abide by American law?

12 MR. FREDERICK: Because it was encroaching on an
13 area of foreign sovereignty. Foreign ships are governed
14 by foreign laws.

15 JUSTICE BREYER: Does -- does Britain -- or does
16 Britain or does the European Union, for example, forbid
17 you to charge this double price?

18 MR. FREDERICK: I don't --

19 JUSTICE BREYER: Does European law -- I'd be
20 surprised if it doesn't forbid it, but do you know?

21 MR. FREDERICK: I -- I don't know the answer to
22 European law on charging of an additional price, but I
23 would point out that pricing, like evacuation procedures,
24 do go to the structure of the vessel. And we're talking
25 here fundamentally in the ADA about structural changes

1 that they want to impose that go -- when ships travel,
2 they can't dismantle those structural changes when they
3 leave U.S. waters.

4 JUSTICE STEVENS: Mr. -- may I ask this question
5 to you? What about a -- an American-flagged ship? Does
6 the statute apply or not?

7 MR. FREDERICK: Well, the Fifth Circuit reserved
8 that question.

9 JUSTICE STEVENS: What is your view?

10 MR. FREDERICK: Our view is that there are
11 arguments that can be made that it does not because
12 Congress didn't --

13 JUSTICE STEVENS: What is your view? Not what
14 arguments can be made. What is your view?

15 MR. FREDERICK: Well, I think --

16 (Laughter.)

17 MR. FREDERICK: No. I think our view is that it
18 doesn't.

19 JUSTICE STEVENS: It does not apply.

20 MR. FREDERICK: It does not apply because
21 Congress didn't express the intent.

22 JUSTICE STEVENS: So really, we're not concerned
23 with the fact this is a foreign-flagged ship. You're
24 concerned with the fact it's a ship.

25 MR. FREDERICK: The -- there's a difference and

1 -- and there are about 1,000 U.S.-flagged ships that carry
2 passengers, so that if Congress had given any thought to
3 the question, it is reasonable to suppose it might have
4 distinguished between U.S. ships for which U.S. law
5 directly governs and foreign ships that are governed by a
6 different law. The fact --

7 JUSTICE SCALIA: Do we need -- do we need a
8 clear statement for United States ships? I thought your
9 case rested on a clear statement requirement. Is there
10 any clear statement requirement for U.S. ships?

11 MR. FREDERICK: No, no, Justice Scalia.

12 JUSTICE SCALIA: So why -- why isn't there a
13 clear difference between the two?

14 MR. FREDERICK: Because there aren't any words
15 in the statute that go to ships. The best they can do is
16 a catchall phrase at the end of bus, rail, and any other
17 means of conveyance.

18 JUSTICE SCALIA: Well, that's pretty good, isn't
19 it?

20 MR. FREDERICK: Well, it's not --

21 (Laughter.)

22 JUSTICE SCALIA: If you don't require a clear
23 statement, that's -- that's good enough, it seems to me.

24 MR. FREDERICK: Well --

25 JUSTICE SCALIA: Your -- your case hangs on the

1 fact that, you know, when Congress wants to -- to rule the
2 world and say all ships in the -- in the world that touch
3 at our ports have to have this kind of a thing, it says so
4 clearly. It doesn't have to say so with perfect clarity
5 with respect to American ships.

6 MR. FREDERICK: With respect to foreign ships,
7 there is a clear statement rule and that clear statement
8 rule is embodied in the fact that a foreign ship is
9 governed by the law of the flag state where it is
10 registered. That's been the rule for 200 years.

11 And the other side's position --

12 JUSTICE O'CONNOR: Well, is that limited,
13 though, just to things that affect the internal order of
14 the ship? Is that the context in which we've articulated
15 that rule?

16 MR. FREDERICK: Well, it's been articulated in
17 several different contexts. In the Brown v. Duchesne
18 case, the Court 150 years ago articulated in a patent case
19 where the Court said that a patented device on the ship,
20 which was the French ship in Boston Harbor infringing an
21 American patentholder, would not apply U.S. patent law.
22 And the Court said, because we can't conceive that
23 Congress would have imagined this general language to
24 encroach on the sovereignty of a foreign ship.

25 Now, the other side has exactly two sentences to

1 say about that case, but that is the case that is directly
2 on point because that case says that when you are dealing
3 with American laws that are generally written, you would
4 not ordinarily apply them to a foreign ship unless
5 Congress said so specifically.

6 JUSTICE SOUTER: But -- but in that case, there
7 was -- as I understand it, there was no legal relationship
8 of any sort between the supplier of the patent-infringing
9 object and the ship in the United States. So it at least
10 made sense to classify that with internal order as opposed
11 to external relationships arguably involving -- or
12 implicating American law. You've got exactly the opposite
13 situation here. You've got contracts made in the United
14 States with the foreign cruise line. You didn't have that
15 in your patent case.

16 MR. FREDERICK: Well, Justice Souter, you have a
17 foreign ship owned by a foreign corporation built in a
18 foreign country under foreign engineering standards --

19 JUSTICE GINSBURG: With its principal place of
20 business in the United States.

21 MR. FREDERICK: For a time before that ship
22 moves into another market.

23 JUSTICE SOUTER: Its significant external -- its
24 significant commercial relationships are in the United
25 States with people in the United States performed

1 partially in the United States.

2 MR. FREDERICK: In just the same way that
3 McCulloch the Court said that labor standards for a course
4 of business that is regular between Honduras and the
5 United States is not going to be sufficient to apply --

6 JUSTICE GINSBURG: The crew members were
7 Honduran in that case.

8 MR. FREDERICK: They were.

9 JUSTICE GINSBURG: This -- if you just look at
10 it, suppose you were not a lawyer and you look at this
11 operation. You'd say that's got USA written all over it.
12 The passengers are from the USA. The company is centered
13 in Florida. And then you have this flag of convenience
14 that it flies which can legitimately govern the
15 relationship with its crew. But to say that it governs
16 the relationship with passengers, it seems to me very
17 strange.

18 And also the ticket says, passenger, if you're
19 going to sue us, it's got to be in the United States and
20 under U.S. law to boot.

21 MR. FREDERICK: But a choice-of-law clause,
22 Justice Ginsburg, has never been held to incorporate law
23 in the sense that laws that don't apply are going to be
24 incorporated. I'm not aware of any choice-of-law clause
25 that -- that simply takes in every domestic statute.

1 JUSTICE GINSBURG: Just -- it's just one other
2 indicia that one looks at this operation and says this
3 belongs to the USA. A practical judgment, I think, would
4 come down there.

5 MR. FREDERICK: And -- and you would have --
6 under their theory, you would have the Consumer Products
7 Safety Act, the Food and Drug Act, OSHA, all sorts of
8 other statutes of general application that are now going
9 to be imposed on foreign vessels simply because they do a
10 lot of business in the United States.

11 The problem here, as a matter of congressional
12 intent, is we don't know what Congress thought about this,
13 and because Congress --

14 JUSTICE KENNEDY: Well, we -- we do -- we do
15 have the rule if it -- if it applies to the internal
16 operations of the ship, and so far as the crew is
17 concerned, the Jones Act and OSHA, it seems to me, may
18 well be governed by the law of the flag.

19 MR. FREDERICK: And the internal operations of
20 the ship, Justice Kennedy, is part and parcel of how it is
21 designed, what are the evacuation points, how are the
22 cabins laid out, what ramps are placed where, how --
23 everything about the ship's design --

24 JUSTICE KENNEDY: That's a part of the case I'm
25 not sure about, and it seems to me, again, it can be

1 fought out under the reasonably achievable --

2 MR. FREDERICK: It doesn't -- Justice Kennedy,
3 the problem with that theory is it just doesn't comport
4 with the language of -- of the statute. Congress didn't
5 think in terms of -- as it did in the Oil Pollution Act,
6 it said, if there's a conflict with international law,
7 work it out. Get the Coast Guard with the foreign nations
8 and work out the conflict. It didn't put anything like
9 that in this statute, which is a further indication that
10 if Congress wants to extend this kind of disability
11 protection, it can do that, but it ought to do so
12 willingly.

13 And the Government has had 13 years to come up
14 with rules that would govern cruise ships, and the best
15 they've done, a few days before the top-side briefs in
16 this case were filed, is to issue proposed draft
17 guidelines for ferries, not cruise ships. Most of the
18 regulations that they are pointing to wouldn't have an
19 application to a large passenger cruise ship. If Congress
20 wants to change this, it certainly has the power, but this
21 Court need not open up a Pandora's box of domestic
22 legislation to apply to foreign ships where Congress has
23 not expressed the intent to do that.

24 JUSTICE SOUTER: Could you go back to Justice
25 Breyer's question about the number of foreign ships? Once

1 we get beyond cruise lines, does it -- would -- would the
2 -- the application on your view cover the -- the dozen
3 passengers who decide they want to take a trip on a -- on
4 a cargo boat?

5 MR. FREDERICK: Yes. I don't perceive a
6 limiting principle to the other side's position. In fact,
7 there's an amicus brief written where there's only one or
8 two stops in the United States a year, and under their
9 view, that ship would be governed by the ADA as well.

10 If -- if Congress wants to enact these limits,
11 it's certainly free to do so, but this is a highly complex
12 area and ships are different from land-based
13 accommodations because you have to be able to evacuate
14 people within 30 minutes. And so when we train people, we
15 have --

16 JUSTICE STEVENS: But doesn't it -- on the other
17 -- on the other side of the coin, apart from the
18 structural problem -- and I understand the arguments on
19 both sides there. With respect to things like safety
20 drills and access to gambling tables and all that, it
21 seems to me that your answer to that would be, well, we'll
22 just do that once we're on the high seas so there's no
23 conflict with the statute when we're out there.

24 MR. FREDERICK: As a matter of fact, Justice
25 Stevens, we give evacuation drills to the disabled in a

1 different way. We have special access and assistance
2 squads that go to persons with physical challenges to get
3 them off the vessel in an event of a -- a need for
4 evacuation. That's a different procedure than most
5 passengers, but it's -- it is one that is in place.

6 JUSTICE STEVENS: Thank you, Mr. Frederick.

7 Mr. Garre.

8 ORAL ARGUMENT OF GREGORY G. GARRE

9 ON BEHALF OF THE BAHAMAS,

10 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

11 MR. GARRE: Thank you, Justice Stevens, and may
12 it please the Court:

13 Applying title III of the Americans With
14 Disabilities Act to foreign-flagged vessels would invite
15 precisely the sort of international discord, conflict, and
16 confusion that Congress presumably seeks to avoid when it
17 writes American laws.

18 JUSTICE GINSBURG: Do you agree with Mr.
19 Frederick's answer about title II of the Civil Rights Act
20 of 1964? I mean, a lot of countries don't prohibit
21 discrimination.

22 MR. GARRE: Justice Ginsburg, first let me make
23 clear that the Bahamian Government does and all of its
24 cruise vessels are governed by that prohibition.

25 JUSTICE GINSBURG: I'm asking about the

1 application of U.S. law.

2 MR. GARRE: We think that that question can be
3 resolved along the lines that Justice Scalia suggested,
4 which is that when you're dealing with a matter that goes
5 to the internal affairs of the ship -- and there -- we
6 would suggest that there is more central to the internal
7 affairs of the ship than its construction and design.
8 Under international law, article 94 of the Law of -- Law
9 of the Sea Convention, which the Bahamian Government has
10 ratified -- and by the way, the United States has not, and
11 that's an important principle for this Court to keep in
12 mind -- foreign-flagged states may be bound by different
13 international treaties than the United States. Simply
14 trying to draw some conflict resolution device that would
15 deal with treaties that the United States has entered
16 into, international nations have not will not address that
17 problem.

18 JUSTICE GINSBURG: So before you go on to that,
19 I want to be clear on your answer to title II of the Civil
20 Rights Act of '64. There's -- you say, well, that's
21 easier to comply with. But that's not the principle under
22 which you're operating.

23 MR. GARRE: No. With respect, Justice Ginsburg,
24 our principle is that when it comes to the matters that
25 under international law have been traditionally governed

1 by the flag state, then when Congress writes its laws, we
2 presume that unless Congress clearly indicates an
3 affirmative intention to address those matters, it did not
4 intend to. When Congress wrote the ADA, not a word of the
5 statute indicates that it considered the international
6 repercussions of applying that law to foreign-flagged
7 vessels. Not a word --

8 JUSTICE SOUTER: What about the -- what about
9 the full sweep argument? Let's sort of come full circle
10 on that. You -- you say the full sweep argument is no
11 good because the same thing could have been made in
12 McCulloch. The response was there is --

13 JUSTICE SCALIA: What's -- what's the full sweep
14 argument? I don't --

15 JUSTICE SOUTER: Full sweep of the commerce
16 power.

17 MR. GARRE: Justice Souter, first of all, it's
18 -- it -- the statute doesn't say full sweep. It says
19 sweep, and that's in the findings of the ADA. It's
20 reprinted on page 32 of petitioners' brief.

21 And second of all, the definition of Congress,
22 which doesn't contain that sweep language, is almost
23 identical to the definition of commerce in McCulloch,
24 which is on page 15, note 3 of that decision, and that
25 definition, the United States argued in the McCulloch

1 case, was not sufficient to extend U.S. labor laws to
2 foreign-flagged vessels.

3 It's important to understand the -- the
4 potential international conflicts that extending the ADA
5 to foreign-flagged vessels could create. There are more
6 than 40 nations that have adopted anti-discrimination laws
7 for the disabled. Three nations have -- have adopted laws
8 for domestic vessels: Britain, Canada, and Australia. If
9 a country like the United States extended its laws to
10 foreign vessels that entered its ports, then other nations
11 may well follow suit.

12 And if you take a simple hypothetical example,
13 the Queen Mary II traveling from South Hampton to New
14 York, if you look at the guidelines that Britain has
15 adopted for domestic vessels, those guidelines contain
16 different structural and design requirements than the
17 draft guidelines that the United States have promulgated.
18 There are different requirements for door widths. There
19 are different requirements for sloping. There's different
20 requirements for the watertight compartments. There are
21 different requirements about whether vessels have to be --
22 have accessible cabins all throughout the ship.

23 JUSTICE SCALIA: When you say different, you
24 mean you cannot comply with both.

25 MR. GARRE: Well --

1 JUSTICE SCALIA: Is that what you mean? Or --
2 or are those just minimums and -- and the United States
3 would -- would comply with those minimums?

4 MR. GARRE: Justice Scalia, I think in some you
5 could and in others you couldn't. And -- and that's an
6 important -- important point.

7 JUSTICE KENNEDY: And incidentally just for the
8 -- are -- this ship has -- these are regulations that help
9 the disabled?

10 MR. GARRE: Yes, Your -- yes, Your Honor. And
11 -- and in many cases, it's not going to be clear which
12 regulation is going to be more accommodating to the
13 disabled and which is not.

14 JUSTICE BREYER: Could they work that out? That
15 is, if two-thirds of our universe really is American-
16 based, in terms of customers, and we're now only talking
17 about conflicts in -- real conflicts that -- that affect,
18 say, one-third of the universe, that's also true in areas
19 like antitrust or others where the enforcement authorities
20 get together and they try to write memoranda that -- that
21 work this out in a reasonable way. Could -- could the
22 same thing happen here if such real conflicts did emerge?

23 MR. GARRE: We don't think so, Justice Breyer.

24 JUSTICE BREYER: Because?

25 MR. GARRE: We would take the same approach that

1 this Court emphasized in -- in the McCulloch case, which
2 is that kind of ad hoc balancing analysis would wreak
3 havoc for the question whether a significant regulation
4 like the ADA would apply to a vessel. How would foreign
5 vessels know, when they enter U.S. ports, whether they
6 have to undertake the extraordinary changes --

7 JUSTICE BREYER: The answer would be yes, you
8 do. You do have to, and then if there's some other
9 authority that wants to get involved in this, the two
10 authorities would work it out.

11 MR. GARRE: Justice Breyer, the way that those
12 issues are worked out in the international shipping
13 context is through the International Maritime
14 Organization. This organization has been responsible for
15 crafting scores of conventions, hundreds of shipping
16 codes, and it's already begun to address the issue of
17 accessibility on ships for the disabled and the elderly.
18 We cite the 1996 guidelines in our brief. Those
19 guidelines right now are -- are not binding guidelines,
20 but they could well become binding guidelines. And when
21 an organization like the IMO addresses this question, it
22 resolves --

23 JUSTICE BREYER: That's perfect because then the
24 Government says that once it becomes a matter of binding
25 international rule, anything that conflicts with that will

1 be viewed as not reasonably achievable. So all you have
2 to do is that and then there's no longer a problem with
3 American law, according to them.

4 MR. GARRE: Well, we don't think the readily
5 achievable language in the first case in any way
6 contemplates conflicts with international law. This Court
7 has a separate canon that's almost as old as the country
8 that it presumes Congress doesn't intend to interfere with
9 international obligations or international laws, including
10 customary international law, as you wrote for the Court
11 last term in -- in the *Empagran* case. We presume that
12 American legislatures give respect to the interests of
13 sovereign nations when they write their laws, and we don't
14 assume that Congress intends to intrude on the sovereign
15 interests of other nations. And that's what extending the
16 ADA to foreign-flagged ships would do.

17 The Bahamian Government has a solemn
18 responsibility under international law and under its own
19 law to govern the construction and design of all flags of
20 all ships that fly -- fly its flags. Article 10 of the
21 Geneva Convention on the High Seas recognizes that flag
22 states have responsibility for the construction and design
23 of ships. Article 94 of the Law of the Sea Conventions
24 specifies that flag states have responsibility over
25 administrative, technical, and labor matters, including

1 construction and design matters. These are precisely the
2 sorts of matters that for centuries the flag state has
3 been responsible for. And in the Brown v. Duchesne case,
4 this Court recognized that, a case that dealt with the
5 application of patent laws to the construction and design
6 of a foreign-flagged vessels.

7 There are going to be conflicts within --
8 between international law and the requirements of the ADA,
9 but first of all, there's going to be confusion. It's
10 been more than a decade since the ADA was passed, and we
11 don't even have final regulations as to what rules apply.
12 And in the meantime, foreign-flagged vessels are going to
13 have to be reviewing the case law in the United States
14 courts, determining on a vessel-by-vessel, design
15 specification-by-design specification as to what standards
16 apply. That's only going to create additional
17 international discord and confusion.

18 Petitioners proposed solution to this problem we
19 think is telling. They urge this Court in their reply
20 brief if there is a problem after the ADA is extended to
21 foreign-flagged ships and other nations begin to follow
22 suit and you have a crazy made -- maze of different
23 regulations applying to construction and design, then at
24 that point, the United States can go to the IMO and ask it
25 to clean up the mess.

1 With respect, we think they have it backwards.
2 The purpose of the IMO and the international framework
3 that exists for governing regulation of shipping is to
4 establish a uniform set of rules in the first instance.
5 The IMO has already begun to address the problem at issue
6 in this case, accessibility for the disabled. They are
7 available to address that in a multilateral fashion.

8 And Congress, in enacting the ADA, gave no
9 indication that it weighed any of the international
10 repercussions of the action that petitioners urges the
11 case -- petitioners urge the Court to take in this case.
12 And we would urge this Court to return this matter to
13 Congress. Congress is in the position to weigh the risk
14 of international confusion, to weigh the potential for
15 international discord and to address those matters as it
16 sees -- sees fit.

17 If there are no further questions.

18 JUSTICE STEVENS: Thank you, Mr. Garre.

19 Mr. Goldstein, you have about 40 seconds.

20 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

21 ON BEHALF OF THE PETITIONERS

22 MR. GOLDSTEIN: Justice Breyer and Justice
23 Ginsburg, our position is the one that can accommodate
24 your concerns. Theirs cannot. Just like in Empagran,
25 where this Court built in comity considerations, relying

1 on cases like Lauritzen that involved foreign-flagged
2 ships, it said, look, even if the text of the Sherman Act
3 or the FTAIA could literally reach it, in these cases that
4 we don't think Congress could have conceived of, we're not
5 going to apply the statute.

6 But here, we have a situation in which this
7 company has 95 percent of its cruises going in and out
8 from the United States. Millions of people, and billions
9 of dollars in commerce are affected by this statute and
10 Americans that Congress had to have in mind.

11 JUSTICE STEVENS: Thank you, Mr. Goldstein.

12 The case is submitted.

13 (Whereupon, at 11:03 a.m., the case in the
14 above-entitled matter was submitted.)
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